

Transcripts of oral leniency statements should be disclosed

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Oral leniency statements do not enjoy the intended protection against disclosure. The highest Dutch administrative appeal court recently ruled that copies of transcripts of oral statements by leniency applicants should be provided to other cartel participants in aid of their defence in appeal proceedings. The Dutch Authority for Consumers and Markets unsuccessfully argued that disclosure would harm the effectiveness of its leniency programme.

In appeal proceedings against a cartel decision, the Dutch Authority for Consumers and Markets, ACM, had requested that copies of the transcripts of the oral leniency statements be disclosed only to the Trade and Industry Appeals Tribunal, not to the cartel participants appealing the ACM's decision. Counsel for these cartel participants had earlier obtained access to the transcripts at the ACM offices (without being allowed to make copies). This is also common practice in cartel proceedings filed with the European Commission. According to the ACM, non-disclosure of leniency statements is the key to an effective leniency programme. If the transcripts were provided to the other cartel participants, third parties could easily get hold of the transcripts and rely on them in cartel damages claims against the leniency applicants. This would deter companies from applying for leniency.

The Trade and Industry Appeals Tribunal rejected the ACM's request for restricted disclosure. According to the tribunal – which appeared to act at its own initiative without any defendant having protested against non-disclosure – a balance should be struck between the interests of the cartel participants in having access to all relevant evidence for a proper defence against their cartel fine and, on the other hand, the interest of the leniency applicants not to be disproportionately harmed by disclosure and the importance of effective ACM enforcement. In this particular case, the interests of a proper defence outweighed the success rate of the ACM's leniency programme. The content of the leniency statements was known to the other cartel participants and the involvement of the leniency applicants in the cartel could also be derived from other, non-confidential documents. The tribunal therefore ruled that the ACM should submit copies of the transcripts.